IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TIG INSURANCE COMPANY

Petitioner,

v.

Upon Original Jurisdiction in Prohibition,
No. _____

THE HONORABLE ARTHUR M. RECHT, WILLIAM O. GALLOWAY, GALLOWAY LAW OFFICES, CAMBRIDGE PROFESSIONAL LIABILITY SERVICES and JOHN DOES UNKNOWN, JEFFREY A. HORKULIC, REBECCA A. HORKULIC, his wife, and JEFFREY HORKULIC, as natural parent and legal guardian of STEPHANIE HORKULIC and BENJAMIN HORKULIC, minors,

Respondents.

PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

TIG INSURANCE COMPANY,

By Counsel.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PETITION FOR WRIT OF PROHIBITION

COMES NOW the Petitioner, TIG Insurance Company ("TIG"), by and through counsel, and petitions this Honorable Court to award a Writ of Prohibition against the Respondents, the Honorable Arthur M. Recht, in his official capacity as Judge of the Circuit Court of Hancock County, West Virginia, William O. Galloway, Galloway Law Offices, Cambridge Professional Liability Services, Accordia of West Virginia, Jeffrey Horkulic, Rebecca A. Horkulic, his wife, and Jeffrey Horkulic, as natural parent and legal guardian of Stephanie Horkulic and Benjamin Horkulic, minors.

STATEMENT OF JURISDICTION

1. This Petition for Writ of Prohibition is filed pursuant to Article 8, § 3 of the West Virginia Constitution, granting the Supreme Court of Appeals original jurisdiction in prohibition, and W.Va. Code § 53-1-1. This Petition is also filed with this Honorable Court pursuant to Rule 14(a) of the *West Virginia Rules of Appellate Procedure*.

2. Pursuant to the original jurisdiction of this Court, TIG seeks relief in the form of a Writ of Prohibition on the basis that the trial court abused its discretion in entering an Order Allowing an Award of Attorney Fees against TIG and an Order requiring TIG to pay attorney fees in the amount of Five Hundred Dollars ($500.00) per hour. *Order (Allowance of Attorney Fees) and Memorandum Opinion and Order (Attorney Fees/Enforcement of Settlement Agreement)*.

3. Prohibition lies as a matter of right in all cases of usurpation and abuse of power by an inferior tribunal or where the tribunal exceeds its legitimate powers. *West Virginia Code* § 53-1-1 (1994); *Glover v. Narick*, 184 W.Va. 381, 400 S.E.2d 816 (1990).

4. A Writ of Prohibition will lie where the abuse of power is so flagrant and violative of a party's rights so as to make the remedy of appeal inadequate. *State ex rel. UMWA Internat'l Union v. Maynard*, 176 W.Va. 131, 342 S.E.2d 96 (1985).

5. In determining whether a rule to show cause will issue in prohibition, the inadequacy of other remedies, such as appeal, and the overall economy of effort and money among litigants, lawyers and the Court will be considered. *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). Accordingly, a Writ of Prohibition will issue where substantial, clear-cut legal errors are committed which may be resolved independent of any disputed facts and resolution of the errors as critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources. *State ex rel. State Auto Mut. Ins. Co. v. Steptoe*, 190 W.Va. 262, 438 S.E.2d 54 (1993); *State ex rel. Allstate Ins. Co. v. Karl*, 190 W.Va. 176, 437 S.E.2d 749 (1993).

6. A Writ of Prohibition is available to correct substantial, clear-cut legal errors with regard to an award of attorney fees that is plainly in contravention of clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts, and only in cases where there is a high probability that trial will be completely reversed if error is not corrected in advance. *See e.g. State ex rel. Dodrill v Egnor*, 198 W.Va. 409, 481 S.E.2d 504 (1996).

7. TIG asserts that the rulings of the trial court as set forth in the two Orders referenced herein are excessive and constitute a flagrant abuse of authority and exceeds the trial court's legitimate powers.

8. A Writ of Prohibition is appropriate and the only available remedy for TIG in this matter for the following reasons:

a. The error committed by the trial court is substantial, clear-cut, and plainly in violation of West Virginia law;

b. The error committed by the trial court may be resolved independently of any disputed facts.

c. TIG has no other adequate means, such as an appeal, to prevent the enforcement of the circuit court's order awarding the attorneys fees, as TIG's right to appeal is not yet ripe because the matter is still pending before the trial Court.

PARTIES

9. The Petitioner, TIG, is a California corporation authorized to do business in West Virginia. TIG is currently a defendant in a civil action pending in the Circuit Court of Hancock County, West Virginia, being Civil Action No. 02-C-244W.

10. Judge Recht is a duly elected Circuit Court Judge in the First Judicial Circuit, and is the presiding Judge in Civil Action No. 02-C-244W.

11. William O. Galloway and Galloway Law Offices are defendants below, named in Civil Action No. 02-C-244W.

12. Cambridge Professional Liability Services is a defendant below, named in Civil Action No. 02-C-244W.

13. Jeffrey Horkulic, is a resident of West Virginia and the natural parent and legal guardian of Stephanie Horkulic and Benjamin Horkulic, minors. These parties are named plaintiffs in Civil Action No. 02-C-244W.

14. Rebecca A. Horkulic is the wife of Jeffrey Horkulic and is a named plaintiff in Civil Action No. 02-C-244W.

FACTUAL AND PROCEDURAL BACKGROUND

15. A detailed statement of facts is set forth in the Memorandum of Law in Support of Petition for Writ of Prohibition, to which reference is hereby made.

ISSUES

16. TIG seeks relief in the form of a Writ of Prohibition on the following bases:

I. The trial court abused its power, committed clear error, and exceeded its legitimate authority by ordering TIG to pay attorneys fees.

II Even if it is determined that an award of attorneys fees was appropriate, the amount of fees awarded is outrageous and excessive.

PRAYER FOR RELIEF

WHEREFORE, the Petitioner TIG Insurance Company prays as follows:

a. That the Petition for Writ of Prohibition be accepted for filing;

b. That this Court issue a rule to show cause against the Respondents directing them to show cause, if any they can, as to why a Writ of Prohibition should not be awarded;

c. That all proceedings in the Circuit Court of Hancock County be stayed until resolution of the issues raised in this Petition;

d. Award a Writ of Prohibition against the Respondents, directing that attorney fees should not be awarded against TIG or, in the alternative, directing that TIG be required to pay attorney fees in the excessive and outrageous amount awarded; and

e. Such other and further relief as the Court may deem proper.

TIG INSURANCE COMPANY,

By Counsel.

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MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an original proceeding seeking the grant of a Writ of Prohibition against the Respondents on the grounds that the trial court abused its power, committed clear error, and exceeded its legitimate authority in entering an Order requiring Petitioner TIG Insurance Company ("TIG") to pay an award of attorney fees in the outrageously excessive amount of Five Hundred Dollars ($500.00) per hour. On August 25, 2006, the trial court entered an Order granting a Motion to Compel Enforcement of Compromise Settlement Agreement filed by the plaintiffs below and respondents herein, Jeffrey A. Horkulic, Rebecca A. Horkulic, and Jeffrey A. Horkulic, as natural parent and legal guardian of Stephanie Horkulic and Benjamin Horkulic (hereinafter collectively referred to as "plaintiffs"), in a legal malpractice action filed against attorney William E. Galloway and Galloway Law Offices, defendants below. The trial court did not permit TIG to participate in the May 30, 2006 plenary hearing conducted on plaintiffs' Motion to enforce settlement, even though TIG's participation in the plenary hearing was essential considering that TIG's involvement in the settlement, as Mr. Galloway's malpractice insurer, was directly at issue. Despite not allowing TIG to participate in the plenary hearing, the trial court, after granting the plaintiffs' Motion, ordered TIG to pay attorney fees in the outrageous amount of Fifty Thousand Seven Hundred Fifty Dollars ($50,750.00) plus expenses. *See 10/4/06 Order (Allowance of Attorney Fees), attached hereto as Exhibits A and 10/4/06 (Memorandum Opinion and Order)(Attorney Fees/Enforcement of Settlement Agreement) attached hereto as Exhibit B, respectively.* TIG files this Petition for Writ of Prohibition seeking to prevent enforcement of these Orders.

II. STATEMENT OF FACTS

The underlying action is a legal malpractice action filed by plaintiffs against their former attorney, William E. Galloway.[1] At all relevant times, Mr. Galloway was insured under a liability policy issued by TIG with liability limits of Five Hundred Thousand Dollars ($500,000.00)(hereinafter referred to as "the policy"). TIG undertook the defense of Mr. Galloway in the underlying action and retained attorney William D. Wilmoth to defend Mr. Galloway. However, Mr. Galloway continued to be represented by his own attorney, Jason Cuomo. On October 27, 2003, plaintiffs amended their complaint to assert a cause of action for third-party bad faith against, among others, TIG. *First Amended Complaint at ¶¶ 33-36.* All claims against TIG were subsequently bifurcated and stayed pending resolution of the malpractice action against Mr. Galloway.

A. Settlement Negotiations

On or about May 4, 2005, Mark S. Rapponotti, a Senior Claims Analyst for TIG, was contacted by telephone by Mr. Galloway's counsel, William D. Wilmoth and plaintiffs' counsel, Robert P. Fitzsimmons, to discuss the possible settlement of the legal malpractice portion of the

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[1]Plaintiffs retained Mr. Galloway to represent them eleven days after they were involved in an automobile accident on November 19, 1999. It is undisputed that Mr. Galloway failed to file an action against the alleged tortfeasor on behalf of the plaintiffs prior to the applicable statute of limitations expiring. It is also undisputed that plaintiffs' special damages as a result of the injuries they allegedly received in the automobile accident were approximately $30,000 and that the alleged tortfeasor's auto liability limit was $100,000. Nevertheless, as part of the settlement agreement which the trial court found had been reached in the malpractice claim against Mr. Galloway, Mr. Galloway consented to a judgment that provided that the value of the plaintiffs' underlying personal injury claim was $1.5 million.

It is further undisputed that the only reason plaintiffs insisted that Mr. Galloway consent to such a judgment as part of the settlement of their malpractice claim was to use the consent judgment to "set the value" of their "bad faith" claims against TIG and others. *See 12/9/05 Hearing Transcript, p. 47-48.*

underlying lawsuit. During the telephone conference, Mr. Wilmoth explained two settlement proposals to Mr. Rapponotti: (1) TIG would pay plaintiffs Four Hundred Fifty Thousand Dollar ($450,000.00) and Mr. Galloway would consent to judgment in the amount of One Million Five Hundred Thousand Dollars ($1,500,000.00); or, alternatively, (2) TIG would pay plaintiffs One Million Dollars ($1,000,000.00).

On that same day, Mr. Wilmoth wrote Mr. Rapponotti a letter outlining the above two settlement proposals. By letter dated May 6, 2005, Mr. Rapponotti, on behalf of TIG, extended settlement authority to Mr. Wilmoth in the amount of Five Hundred Thousand Dollars ($500,000.00).[2] *See TIG's Response to Plaintiff's Motion and Supplemental Motion to Compel Settlement, Exhibit B.* However, Mr. Rapponotti conditioned the settlement authority extended to Mr. Wilmoth as follows:

> . . . upon your recommendations, ***subject to Mr. Galloway's consent***, you are granted authority to settle the malpractice portion of this case within the full $500,000 policy limits of the TIG policy. Please be advised that ***nothing herein constitutes a waiver of any rights or defenses of TIG*** under the TIG policy or relevant law.

Id. (emphasis added).

On May 17, 2005, Mr. Rapponitti faxed a letter to Mr. Wilmoth in which he requested that Mr. Wilmoth provide him the status of the settlement discussions. *Id. at Exhibit* C. Mr.

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[2]TIG offered Five Hundred Thousand Dollars ($500,000) even though plaintiffs had only demanded Four Hundred Fifty Thousand Dollars ($450,000) because it was determined that, despite being advised to the contrary, the parties were asserting that only Four Hundred Fifty Thousand ($450,000) in limits remained available under Mr. Galloway's policy. After TIG explained that the full amount of the Five Hundred Thousand Dollar ($500,000) limits remained available, plaintiffs through Mr. Fitzsimmons stated they would "stick to" the Four Hundred Fifty Thousand Dollar ($450,000) figure. TIG, however, insisted that the plaintiffs could not continue to represent that the Four Hundred Fifty Thousand ($450,000) figure was the policy limits of the TIG policy. *See 5/30/06 hearing transcript, page 60-61.*

Wilmoth responded by e-mail on May 24, 2005 as follows:

> We have ***provisionally*** settled [plaintiffs'] case against Bill Galloway for $450,000. All depositions and the trial have been postponed. The sticking point, as you know, is Bob Fitzsimmons' insistence on the consent judgment of $1.5 million, with agreement not to execute on Mr. Galloway's personal assets. Plaintiffs wanted TIG to agree to the entry of the consent judgment, which TIG was not inclined to do. Therefore, [plaintiffs] will file a 'Motion for Entry of Consent Judgment,' to which Mr. Galloway will agree (to protect his assets).

Id. at Exhibit D. (emphasis added). By letter dated June 13, 2005, TIG, though counsel Beth Ann Berger Zerman, informed Mr. Wilmoth that the "provisional" settlement outlined in his May 24, 2005 e-mail was in direct contravention of the settlement authority extended by TIG on May 6, 2005 and further informed Mr. Wilmoth that TIG was:

> . . .considering its options under the following terms of the TIG Policy in the event that Mr. Galloway moves forward with a consent judgment [as outlined in Mr. Wilmoth's e-mail]:
>
> II. Defense, Settlement and Claims Expenses
>
> With respect to such insurance as is afforded by this Policy:
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> ***
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> B. .... The insured shall not, except at the Insured's own cost, make any payment, admit any liability, assume an obligation, incur any charge, or expense, or enter into any settlement without [TIG's] prior written consent; and
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> ***

Id. at Exhibit E.

Despite the forgoing letters to the contrary, by letter dated July 27, 2005, Mr. Fitzsimmons stated that "each of the terms [including the Mr. Galloway's consent to judgment] was also approved by the insurance agent representing the insurance company." *See Exhibit 2 to*

Plaintiffs' Motion to Compel Settlement. However, not only did TIG not consent to the purported settlement, but neither did Mr. Galloway. On August 30, 2005, Mr. Galloway's personal attorney, Jason Cuomo, wrote a letter to Mr. Wilmoth in which he, in no uncertain terms, informed Mr. Wilmoth that "***Bill Galloway has not entered into any agreement regarding a consent to judgment in any amount***. . . ." *See Exhibit C to TIG's Response to Plaintiffs' Motion and Supplement to Motion to Compel Settlement Agreement. (emphasis added).* Mr. Cuomo copied Mr. Galloway and Ms. Berger Zerman on the letter. *Id.*[3]

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[3]Mr. Cuomo reiterated Mr. Galloway's refusal to enter into a consent judgment during the December 9, 2005 hearing on Plaintiffs' Motion to Compel Settlement. Specifically, Mr. Cuomo provided as follows:

THE COURT:	. . . Do you want to say anything, Mr Cuomo?
MR. JASON CUOMO:	Other than our recollection is accurately reflected in our response [to plaintiffs' Motion to Compel Settlement] which we've already filed relating to the conversations that occurred on May 4th, '05. And whether we consented to it or not, it's our position ***it was not consented to.***
THE COURT:	You take issue with what Mr. Wilmoth just said?
MR. JASON CUOMO:	To a degree, yeah. If his impression is that he received consent during that conversation, I would disagree with it.
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THE COURT:	. . . . I got to ask you this, Mr. Cuomo: When you got Mr Wilmoth's letter and I keep harping on this, the September 29th letter, which there is no smoking gun here, just a bunch of little things - - but why didn't you respond at that time saying that Mr. Galloway does not consent to the consent to judgment? . . . .
MR. JASON CUOMO:	Frankly, I don't know off the top of my head. . . . I maybe intended to respond with a response brief. I don't know. I know I've never changed my position on what occurred during that conversation on May 4th.

Nevertheless, on or about September 1, 2005, plaintiffs again attempted to "confirm" the "settlement" for a Five Hundred Thousand Dollars cash payment from TIG and a consent to judgment in the amount of $1.5 Million by Mr. Galloway. *Id. at Exhibit D.* And, again, both Mr. Galloway and TIG, through their respective counsel, Jason Cuomo and Thomas V. Flaherty, rejected the settlement confirmation. *Id. at Exhibits E and F.* Not to be dissuaded, on September 16, 2005, Mr. Fitzimmons requested that he be advised as to when he would receive the settlement documents for the settlement, a settlement that both Mr. Galloway and TIG had already disavowed. *Id. at Exhibit G.*

In response, on September 21, 2005, Mr. Flaherty, on behalf of TIG, wrote a letter to Mr. Fitzsimmons in which he informed Mr. Fitzsimmons that TIG "is prepared to issue the $500,000.00 settlement check at Mr. Wilmoth's direction once he and his clients have confirmed a settlement." *Id. at Exhibit H.*

On September 29, 2005, Mr. Wilmoth wrote to Mr. Fitzsimmons and confirmed the settlement, as requested in Mr. Fitzsimmons' September 1, 2005 letter, based upon a telephone conference that took place on August 18, 2005 between himself, Mr. Fitzsimmons and Ms. Berger Zerman. *Id. at Exhibit I.* During the August 18, 2005 telephone conference, however, TIG and its counsel were informed by Mr. Wilmoth that Mr. Galloway had agreed to settle the

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> So it's not like – what's being implied here is that we sent a letter to Mr. Wilmoth telling him we did not consent, that Mr. Galloway did not consent to the confession judgment at the May 4th hearing, and then at some point after my letter to him and ***prior to September 29th, that maybe he did turn around and change his mind, say I did consent. That just didn't happen.***

See 12/9/05 Hearing Transcript, p. 36, 39-40.(emphasis added).

malpractice claim by payment of Five Hundred Thousand Dollars ($500,000) cash from the TIG policy and by stipulating to a $1.5 Million total judgment against him. TIG again objected to the stipulated judgment of $1.5 Million as TIG had all along consistently done. TIG did agree to pay the Five Hundred Thousand Dollar ($500,000) policy limits subject to its objections, based upon Mr. Wilmoth's representation that Mr. Galloway had authorized the same. TIG then received a letter dated August 30, 2005 from Mr. Cuomo, personal counsel for Mr. Galloway, in which Mr. Cuomo asserted that Mr. Galloway had neither authorized a Five Hundred Thousand Dollar ($500,000) cash settlement from the insurance policy proceeds, nor a $1.5 Million stipulated judgment.

Clearly, as set forth herein, TIG's settlement authority was always contingent upon Mr. Galloway's consent. As Mr. Flaherty succinctly stated during the December 9, 2005 hearing on Plaintiffs' Motion to Compel Settlement:

> TIG's position has been the same since May 6th when Rappinotti wrote the letter to Mr. Wilmoth. It's the same today. [TIG is] prepared to pay [its] policy limits of $500,000. [TIG] gave Mr. Wilmoth that authority in May. It was subject to Mr. Galloway's approval which Mr. Galloway hasn't given. And TIG has said consistently and repeatedly that they will object to a confession of judgment over and above the policy limits . . . .

See 12/9/05 Hearing Transcript, p. 30.

B. <u>Enforcement of Settlement Agreement</u>

On October 21, 2005, plaintiffs filed a Motion to Compel Enforcement of Compromise Settlement Agreement. In their Motion, plaintiffs argued that on May 9, 2005, they entered into a settlement with Mr. Galloway, through Mr. Wilmoth, for the following terms:

> (a) Defendant Galloway would pay [plaintiffs] Four Hundred Fifty Thousand Dollars ($450,000.00) cash;

(b) Attorney Galloway would confess judgment admitting liability and admitting damages to Jeffrey A. Horkulic in the amount of One Million Four Hundred Thousand Dollars ($1,400,000.00) and damages to Rebecca A. Horkulic in the amount of One Hundred Thousand Dollars ($100,000.00);

(c) Attorney Galloway would waive all attorney-client privileges he has to any and all documents and records maintained by [TIG];

(d) As part of the release, language would be inserted acknowledging that [plaintiffs] were not made whole by the settlement for their damages and that Attorney Galloway's policy was fully exhausted as a result of the cash payment, together with expenses;

(e) There was no agreement of confidentiality although [plaintiffs] would exercise their best efforts not to publicize the settlement;

(f) If Attorney Galloway filed any type of claim against his insurer, TIG, [plaintiffs] would receive thirty-three and one-third percent (33-1/3%) of the gross amount of any monies collected;

(g) TIG would not consent to the confessed judgments of liability and damages;

(h) [Plaintiffs] would agree not to execute on the judgment against Attorney Galloway above the Four Hundred Fifty Thousand Dollar [sic] ($450,000.00) agreed upon cash payment and would also agree not to record the judgment in the County Clerk's Office;

(I) A request would be made to the Court to determine that this was a good-faith settlement; and

(j) Although not part of the settlement agreement, Attorney Wilmoth once against [sic] indicated he did not think that structuring part of the settlement proceeds would be a problem and, if so, he would advise [plaintiffs'] counsel.

See plaintiffs' Motion to Compel Settlement, p. 4–6. TIG responded to plaintiffs' Motion to Compel Settlement and argued that there was clearly no meeting of the minds, and, therefore,

there could be no settlement. *See TIG's Response to Motion to Compel Settlement.* Mr. Galloway similarly responded to plaintiffs' Motion and stated that he also did not consent to the proposed settlement. *See Galloway's Response to Plaintiffs' Motion to Compel Settlement.*

On December 9, 2005, the trial court conducted a hearing on plaintiffs' Motion. During the hearing, as set forth above, both TIG and Mr. Galloway, through their respective counsel, informed the trial court that there had never been an agreement as to all of the essential terms of the settlement proposed by plaintiffs, particularly plaintiffs' demand that Mr. Galloway consent to judgment in the amount of 1.5 Million Dollars. After hearing arguments from all parties, Judge Recht concluded that:

> I think there are serious issues as to whether or not there was a meeting of the minds. And I do think that, no matter what I would do in regard to the - - if I would grant it, I think the Supreme Court would take a look at it, and there are factual issues. There just are. . . . We're dealing with people here that - - and that could be just a question of perception as to what it meant. . .

See 12/9/05 Hearing Transcript, p. 42-43. After discussing various options with how to resolve the settlement issue, the trial court set the matter for a plenary hearing to determine whether there had been a "meeting of the minds." *Id. at 54-55.*

On March 29, 2006, the trial court conducted a status conference during which the parameters of the plenary hearing were set. One parameter requested by Mr. Fitzsimmons was that TIG not be allowed to participate. *See 3/29/06 Hearing Transcript, p. 12.* In support of his request, Mr. Fitzsimmons argued that the issue of whether there was a settlement or not was between plaintiffs and Mr. Galloway alone ***and "has nothing to do with [TIG]."*** [4] *Id. (emphasis*

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[4]Although Mr. Fitzsimmons argued that TIG was an "interloper" in connection with the issue of whether there was a settlement, he did recognize that there may be issues between Mr. Galloway and TIG that "may flow from [the settlement agreement]." *Id., p. 16.*

added). In response, both Ms. Berger Zerman and Mr. Flaherty objected to TIG's exclusion from the plenary hearing as follows:

> MS. ZERMAN: Your Honor, if Mr. Fitzsimmons is willing to leave TIG out of his arguments in connection with the settlement, that would be fine. But we believe that he's going to use it as an opportunity to put things on the record, as he did in his brief, for his benefit that [TIG] will not have opportunity to object to. So as far as that goes, we're not willing to sit idly by and allow that to happen. . . . If [TIG is] not brought into the mix as [it] was with respect to Mr. Fitzsimmons's briefs, then [TIG is] willing to sit on the sidelines, but in the event allegations are made directly against TIG, we need the opportunity to object to those on the record.
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> ***
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> MR. FLAHERTY: . . . .I think Ms. Zerman's point is a serious one as to how far Mr. Fitzsimmons goes after TIG and what went on between Wilmoth and TIG.
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> MS. ZERMAN If Wilmoth testifies saying that Mark Rapinotte (sic) said certain things, you know, that's on the record. [TIG has] no opportunity to - - then [TIG has] no opportunity to respond to those allegations.

Id., p. 13-14, 19. Over TIG's objections, the trial court ultimately determined that TIG would not be allowed to participate during the plenary hearing. *Id., p. 23*.

Accordingly, pursuant to the trial court's ruling, the plenary hearing went forward on plaintiffs' Motion to Compel Settlement on May 30, 2006 without TIG's participation.[5] And, despite Mr. Fitzsimmons' assertions that the issue of whether a settlement had been reached had ***"nothing to do with TIG,"*** the focus from the very beginning of the hearing was TIG's consent to

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[5]The trial court also entertained Mr. Galloway's Motion for Injunctive Relief in which he sought an order that his personal assets were not at risk and would be completely protected from both plaintiffs and TIG. *See Motion for Injunctive Relief*. TIG was not given any prior notice that the trial court would address Mr. Galloway's Motion during the hearing nor was TIG allowed to participate.

the settlement and TIG's "motives" for consenting or not consenting to the settlement. However, instead of allowing TIG to offer evidence of its consent or lack thereof or of its motives, the trial court relied upon Mr. Wilmoth's "understanding" of what TIG "meant" during certain conversations during which settlement was discussed.[6] *See 5/30/06 Hearing Transcript.*

On August 25, 2006, the trial court entered an Order granting plaintiffs' Motion to Compel. *See August 25, 2006 Order*. Even though TIG was prevented from participating in the hearing by the trial court because the settlement ***"had nothing to do with TIG,"*** the August 25, 2006 Order contained the following findings of fact[7] which clearly and directly had "more than something" to do with TIG:

> (11) Galloway's attorney discussed the alternative settlement proposals with a Senior Corporate Claims Analyst from TIG, namely, Mark S. Rapponotti (who is an attorney), and obtained authority to settle the claim on behalf of Defendant Galloway in accordance with alternative A with the exception that TIG would not consent to the confession of judgments.
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> (12) On or about May 9, 2005, Attorney Wilmoth contacted Attorney Fitzsimmons and advised him that he had authority to enter into a settlement agreement generally consistent with Alternative A, and Galloway's attorney and [plaintiffs'] attorney entered into a settlement agreement upon the following terms:
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> (a) TIG as insurer for Defendant Galloway would pay

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[6]As set forth herein, both TIG and Mr. Galloway, through their respective counsel, had already informed the trial court through written briefs and during the December 9, 2005 hearing, that, contrary to Mr. Wilmoth's "understanding," they had never consented to the consent to judgment provision of the settlement. As such, the reliability of Mr. Wilmoth's "undertaking" of these matters was suspect.

[7]Most if not all of the findings of fact set forth in the trial court's Order which relate to TIG are based upon the hearsay testimony of Mr. Wilmoth during the plenary hearing. TIG objected to the introduction of hearsay testimony but was overruled. *See 5/30/06 Hearing Transcript, p. 49-51.*

[plaintiffs] Four Hundred Fifty Thousand Dollars ($450,000.00) cash;

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(g) TIG would not consent to the confessed judgment of liability and damages;

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(15) The only disagreement as to the terms of the settlement among [plaintiffs], Galloway and TIG, appears to be the provision wherein Galloway and TIG were asked to consent to a confessed judgment of liability and damages.

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(18) On or about August 18, 2005, a telephonic conference was held among William F. Wilmoth; Thomas V. Flaherty, attorney for TIG; Beth Ann Berger Zerman, Attorney for TIG; and Mr. Ruberry, as representative for TIG.[8] After discussing the parameters of the settlement, the parties included [plaintiffs'] attorney, Robert P. Fitzsimmons, in the conference call, and a settlement agreement was reached and confirmed, which included the following items:

(a) [Plaintiffs] would be paid Five Hundred Thousand Dollars ($500,000.00) cash from Galloway's insurance company, TIG; [footnote excluded]

(b) Galloway would confess judgment on liability and also damages for Mr. Horkulic in the amount of One Million Four Hundred Thousand Dollars ($1,400,000.00) and Mrs. Horkulic in the amount of One Hundred Thousand Dollars ($100,000.00);

(c) TIG could file an objection to the confessions of judgment;

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[8] Mr. Ruberry is an attorney with the law firm of Bollinger, Ruberry & Garvey, and appeared as counsel for TIG, not a representative.

(22) Attorney Wilmoth believed at all times material herein based upon his discussion with representatives of TIG that the settlement agreement reached by him on behalf of his client, Galloway, and with [plaintiffs'] counsel would not in any way create personal liability of exposure to Wilmoth's client, Galloway.

(24) Attorney Wilmoth indicated that the claims adjuster, Mark Rapponetti, had only indicated that the insurance company would not consent to the confessions of liability and judgment and never indicated that Attorney Wilmoth did not have the authority to bind the insurer to the confessions of judgment on liability and damages.

(25) Attorney Wilmoth did not know that the insurance company would object to its insured's consent and confession to a judgment on liability and damages until Attorney Wilmoth received a letter from Beth Zerman dated August 25, 2005 ...

(30) The terms of the settlement between [Respondents] and Galloway by and through Galloway's attorney and TIG, are as follows:

(a) TIG would pay [Respondents] Five Hundred Thousand Dollars ($500,000.00) cash;

(b) Defendant Galloway would confess judgment admitting liability and admitting damages to Jeffrey A. Horkulic in the amount of One Million Four Hundred Thousand Dollars ($1,400,000.00) and damages to Rebecca A. Horkulic in the amount of One Hundred Thousand Dollars ($100,000.00);

(c) Defendant Galloway would waive all attorney-client privileges he has to any and all documents and records maintained by his insurer [TIG] and attorneys;

(d) Language would be included in the release acknowledging that [Respondents] were not made whole by the settlement for their damages and that Defendant Galloway's policy of insurance was fully exhausted as a result of the cash payment;

(e) [Respondents] would exercise their best

efforts not to publicize the settlement;

(f) If Defendant Galloway files any type of claim against TIG Insurance Company or Cambridge Professional Liability Services, [Respondents] would receive thirty-three and one-third percent (33-1/3%) of the gross amount of any monies or things collected;

(g) TIG would file an objection to the confessed judgments;

(h) [Respondents] would agree not to execute on the judgment against Defendant Galloway above the Five Hundred Thousand Dollar ($500,000.00) agreed-upon cash payment and would also agree not to record the judgment in the County Clerk's office;

(I) [Respondents] and/or Galloway may request that this Court find that this was a good faith settlement;

(j) [Respondents] may designate any portion of the Five Hundred Thousand Dollars ($500,000.00) settlement for purchasing a structured annuity (which agreement will be hereinafter referred to as the "August 18, 2005, Settlement"); and

(k) A dismissal with prejudice would be filed and entered in favor of Defendant Galloway for all claims against Defendant Galloway.

(31) Attorney Wilmoth and Attorney Fitzsimmons had the actual authority to enter into a settlement upon the terms set forth in the "August 18, 2005, Settlement."

(32) Attorney Wilmoth had the authority from TIG to enter into the settlement upon the terms described in the "August 18, 2005, Settlement."

Id, *p. 6 – 19*. The Order also implicates TIG in the issues relating to Mr. Galloway's Motion for Injuctive Relief:

(28) There are two issues relating to the motions, namely,

***

(b) Whether TIG precluded Wilmoth from including the consent judgment as part of the settlement.

Id., p. 15 – 16. Moreover, the Order introduces the terms of the settlement with the following statement, "The terms of the settlement between the [plaintiffs] and Galloway by and through Galloway's attorney ***and TIG,*** are as follows[.]" *Id. at p. 16. (emphasis added).* The Order further provides that "Attorney Wilmoth ***had the authority from TIG*** to enter into the settlement upon the terms described in the 'August 18, 2005, Settlement.'" *Id. at p. 19. (emphasis added).* Lastly, the Order also includes the following conclusions of law which, again, clearly and directly implicate TIG:

> (9) A settlement agreement was reached between the Horkulics and Galloway's legal representative *and TIG* at the latest by August 18, 2005, the term of which are as follows:
>
> ***
>
> (11) At all times material herein, Attorney Wilmoth had the *actual authority* to bind TIG in the settlement, specifically including the "August 18, 2005, Settlement."
>
> (12) Defendants Galloway and TIG have not fulfilled the terms of the "August 18, 2005, Settlement," and therefore plaintiffs' motion to compel enforcement or compromise of settlement agreements should be granted.
>
> (13) It was Attorney Wilmoth's intent, *which he expressed to TIG,* that this settlement would eliminate any personal exposure or liability of the assets of his client, Defendant Galloway, and *TIG knew or should have known* that the elimination of any personal exposure or liability to Defendant Galloway was a part of the settlement of August 18, 2005.
>
> (14) As a result of the settlement, Galloway's personal assets are not at risk and are completely protected from [plaintiffs] and TIG.

(15) TIG has no right to seek any claim against Defendant Galloway as a result of Defendant Galloway's agreement to consent to a confessed judgment on liability and damages.

Id. at p. 21 – 25. (emphasis added).

Pursuant to the findings of fact and conclusions of law as set forth herein, the trial court ordered as follows:

> **ORDERED** that a judgment in the amount of Five Hundred Thousand Dollars ($500,000.00) be awarded in favor of [plaintiffs] against William E. Galloway, Galloway Law Office *and TIG Insurance Company* as of August 18, 2005, with interest at the rate of ten percent (10%) per annum from August 18, 2005, until paid in full and TIG shall pay said judgment with applicable interest.
>
> ***
>
> **ORDERED** that *TIG Insurance Company is prohibited* from seeking a judgment against Defendant Gallway's personal assets as a result of any of his actions in this proceeding and in his representation of [plaintiffs].

Id. at p. 27, 30 (emphasis added). The Order was entered over TIG's strenuous objections. Thereafter, by Order dated September 29, 2006, the trial court held that the August 25, 2006 Order was a final judgment as contemplated by Rule 54(b) of the *West Virginia Rules of Civil Procedure. See 9/29/06 Order*. On December 22, 2006, TIG filed a Petition for Appeal to this Court seeking relief from the August 25, 2006 Order. The Petition is currently pending.

C. Award of Attorney Fees

On July 6, 2006, plaintiffs filed a Motion for Attorney Fees seeking to recover the attorney fees and costs incurred in connection with their Motion to Compel the settlement with Mr. Galloway. *See Motion for Attorney Fees*. In support thereof, plaintiffs argued that because plaintiffs' counsel was being compensated on a contingency fee basis, the additional time required to prosecute the Motion to Compel would be uncompensated in that it "did not increase the value

of the case but was merely utilized in order to protect that which had been agreed upon." *Motion for Attorney Fees, p. 2.*

With regard to the fees and expenses incurred, Mr. Fitzsimmons stated that he had expended 70.5 hours in the prosecution of the Motion to Compel and had incurred Fifty-Four Dollars ($54.00) in expenses.[9] *Id.* Mr. Fitzsimmons suggested an award of attorney fees in the range of Five Hundred Dollars ($500) to Eight Hundred ($800) per hour. *Id.*

On August 21, 2006, TIG responded to plaintiffs' Motion for Attorney Fees and argued, *inter alia*, that it should not be held liable for damages arising out of the breach of the alleged settlement contract because: (1) it was a stranger to the settlement contract as a bifurcated third-party bad faith defendant; (2) it was not permitted to offer evidence or examine witnesses at the plenary hearing to determine whether a settlement had been reached or whether it had consented to any settlement; and (3) it did not act in "bad faith, vexatiously, wantonly or for oppressive reasons" as required by this Court with respect to the settlement. In further support thereof, plaintiffs cited the Court's decision in *Sanson v. Brandywine Homes, Inc.*, 215 W. Va. 307, 599 S.E.2d 730 (2004). *See TIG's Response to Motion for Attorney Fees, p. 1-2.*

On August 22, 2006, plaintiffs filed a Supplemental Motion for Attorney Fees in which Mr. Fitzsimmons added an additional 31.25 hours to the 70.5 hours he originally claimed he had expended in pursuit of the Motion to Compel. *See Supp. Motion for Attorney Fees, p. 1-2.* Mr. Fitzsimmons also submitted an affidavit raising his original attorney fee from Five Hundred ($500) to Eight Hundred ($800) Dollars to One Thousand ($1,000) per hour. *Id.* However, Mr.

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[9] Itemizations for the time spent and the expenses incurred by Mr. Fitzsimmons' co-counsel, Dean Makricostas and David Dittmar, were included in the Motion for Attorney Fees. However, the trial court did not include Mr. Makricostas and Dittmar's time and expense in its ultimate attorney fee award against TIG.

Fitzsimmons did not attempt to refute any of TIG's arguments that TIG should not be held liable. *Id.*

On September 14, 2006, TIG responded to the Supplemental Motion for attorney fees and objected to Mr. Fitzsimmons interspersing an additional 31.25 hours of "reconstructed time" on the grounds that such "reconstructed time" was not reliable inasmuch as it had not been contemporaneously recorded. *See TIG's Response to Supp. Motion for Attorney Fees, p. 2.* TIG further objected to Mr. Fitzsimmons' suggestion of a One Thousand Dollar ($1000) per hour award on the grounds that such an award would be outrageous given the amount of time spent, the nature of the work involved, and the comparable rates of equally competent attorneys working in the same geographical area and/or in the same case. *Id. p. 3-4.* TIG also submitted an affidavit from Mark Rapponetti in which he attested to the hourly rates of equally competent attorneys working in the same case. Based on these rates, TIG asserted that an appropriate attorney fee award, if any, would be in the range of $150 to $180. *Id.*

On August 25, 2006, a hearing was conducted in relation to plaintiffs' Motion for Attorney Fees during which TIG again asserted the objections set forth in its Responses to plaintiffs' Motion and Supplemental Motion for Attorney Fees. *See 8/25/06 Hearing Transcript..* Nevertheless, on October 4, 2006, the trial court granted plaintiffs' Motion for Attorney Fees. *See Order (Allowance of Attorney Fees) attached hereto as Exhibit A.* In its corresponding Memorandum Opinion and Order, the trial court noted:

> When all of the Petrillo factors are considered and weighed, this Court has no difficulty in awarding the plaintiffs' fees based upon submission of Robert P. Fitzsimmons, Esquire, reflecting a total of One Hundred and one half (101.5) hours expended in the effort to enforce the settlement agreement. Further, this Court finds that a usual and customary fee of Five Hundred Dollars ($500) per hour for a person of Mr. Fitzsimmons' stature in this community is appropriate.

See Memorandum Opinion and Order (Attorney Fees/Enforcement of Settlement Agreement), attached as Exhibit B.(footnotes omitted). The trial court then awarded plaintiffs' attorney fees in the amount of Fifty Thousand Seven Hundred Fifty ($50,750) and expenses in the amount of Fifty-Four Dollars ($54.00). *Id.* TIG's objections to the award of attorney fees were preserved. *Id.*

III. STANDARD FOR GRANTING A WRIT OF PROHIBITION

A Writ of Prohibition will issue "in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." *W.Va. Code* §53-1-1 (1923)(2006); *Glover v. Narick*, 184 W.Va. 381, 400 S.E.2d 816 (1990). When determining whether to entertain and issue a writ of prohibition where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will consider the following five factors: (1) whether petitioner has no other adequate means, such as direct appeal, to obtain the desired relief, (2) whether petitioner will be damaged or prejudiced in a way that is not correctable on appeal, (3) whether the lower tribunal's order is clearly erroneous as a matter of law, (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law, and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. *Bronson v. Wilkes*, 216 W.Va. 293, 607 S.E.2d 399 (2004). While each of these all five factors may be considered, it is the third factor, the existence of clear error as a matter of law, that "should be given substantial weight." *Id.*, *citing State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

In the case *sub judice*, the award of attorney fees against TIG is a "clear error as a matter of law." And, because the Order granting the award of attorney fees is not an appealable order,

TIG's only means of relief is through an issuance of a writ of prohibition from this Court.

IV. ISSUES

A. THE TRIAL COURT ABUSED ITS POWER, COMMITTED CLEAR ERROR, AND EXCEEDED ITS LEGITIMATE AUTHORITY BY ORDERING TIG TO PAY ATTORNEY FEES.

B EVEN IF IT IS DETERMINED THAT AN AWARD OF ATTORNEY FEES WAS APPROPRIATE, THE AMOUNT OF FEES AWARDED IS OUTRAGEOUS AND EXCESSIVE.

V. ARGUMENT

A. THE TRIAL COURT ABUSED ITS POWER, COMMITTED CLEAR ERROR, AND EXCEEDED ITS LEGITIMATE AUTHORITY BY ORDERING TIG TO PAY ATTORNEY FEES.

This Court should grant TIG's Petition for Writ of Prohibition because the trial court's award of attorney fees against TIG in connection with the enforcement of a settlement agreement to which TIG was not a party constitutes a flagrant abuse of authority and exceeds the trial court's legitimate powers. As will be set forth below, the trial court's ruling lacks a basis in law, fact and equity and should, therefore, be set aside by this Court.

As set forth herein, plaintiffs' Motion for Attorney Fees arose solely out of the alleged breach of the settlement contract between plaintiffs and Mr. Galloway. A settlement contract to which TIG was a stranger inasmuch as the settlement related solely to plaintiffs' claims against Mr. Galloway and did not resolve or even address plaintiffs' claims against TIG. Nevertheless, the trial court ordered TIG to pay attorney fees and costs associated with plaintiffs' Motion. In so doing, the trial court made the following "finding of fact:"

> The ***actions of TIG*** in not consummating the settlement agreement found by this Court by a previous Order entered on August 25, 2006, falls within the exceptions for awarding attorney fees as costs and ***specifically constitute oppressive reasons*** for the awarding of such fees.

See Exhibit A, p. 3. (emphasis added). The trial court made this finding even though it specifically prohibited TIG from participating in the plenary hearing conducted to determine whether a settlement had in fact been reached. As such, TIG was prohibited from presenting ***any evidence*** regarding its "actions" in not consummating the settlement agreement or, more importantly, regarding its reasons for believing that ***there was no settlement to consummate.*** Thus, the trial court awarded attorney fees against TIG without determining TIG's "reasons," oppressive or otherwise, for not consummating the "settlement."

Furthermore, it is generally recognized that before a party can be sanctioned, it should be given an opportunity to defend or, at least, explain the conduct for which it is being sanctioned. *See e.g., Bartles v. Hinkle,* 196 W.Va. at 390, 472 S.E.2d at 836 (1996); *Cox v. Slate,* 194 W.Va. 210, 460 S.E.2d 25 (1995); *Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 332 S.E.2d 127, *cert. denied sub nom.*; *Falstaff Brewing Corp. v. Miller Brewing Co.,* 702 F.2d. 770, 784 (9th Cir. 1983). And, while a trial court has broad discretion when ordering sanctions, such discretion is not unlimited and must be just. As this Court recognized in *Bartles, supra,* sanction powers "because of their very potency, ... must be exercised with restraint and discretion.... A primary aspect of ... [a trial court's] discretion is the ability to fashion an *appropriate* sanction for conduct which abuses the judicial process." *Bartles v. Hinkle,* 196 W.Va. at 390, 472 S.E.2d at 836 (1996), *citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45, 111 S.Ct. 2123, 2132-33, 115 L.Ed.2d 27, 45 (1991)(*emphasis in original).* This Court went on to note that a trial court abuses its discretion if a sanction is based on "an erroneous assessment of the evidence or law." *Id., citing, Cox v. Slate,* 194 W.Va. 210, 460 S.E.2d 25 (1995). It goes without saying that before a trial court can properly *assess* the evidence prior to sanctioning a party, it must first *obtain* all of the evidence from all of the parties, including, if not especially, the party against

whom the sanction is sought.

Illustratively, in *Bartles, supra,* this Court addressed the appropriateness of an attorney fee award against Domino's Pizza for failing to comply with a discovery order. In so doing, this Court explained that a party seeking sanctions has the initial burden of proving noncompliance but that, once established, the burden of proof ***"shifts to the noncompliant party to demonstrate that it was unable to comply or that special circumstances exist which make the imposition of sanctions unjust."*** *Id., citing Bell v. Inland Mut. Ins. Co.*, 175 W.Va. 165, 332 S.E.2d 127, *cert. denied sub nom. (emphasis added). See also, Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d. 770, 784 (9th Cir. 1983)("[t]he party against whom an award of expenses is sought has the burden of showing that special circumstances exist that make his or her failure to comply substantially justified"). This Court upheld the attorney fee award after finding that, despite being given the opportunity to explain why it failed to comply with the trial court's orders, the sanctional party "took very little interest in trying to explain their inaction" and only argued that the trial court did not have jurisdiction to impose sanctions. *Id. at 838.*

Conversely, in the instant case, TIG, while very interested, was prevented from explaining its actions in connection with the settlement when it was denied the opportunity to participate in the plenary hearing by the trial court. By not soliciting input from TIG and not affording TIG an opportunity to be heard, the trial court acted in clear contravention of the procedural standards set forth in *Bartles*. As such, the trial court's ruling ordering TIG's to pay attorney fees in connection with the enforcement of the settlement was not based upon any facts.

As this Court further noted in *Bartles, supra,* the rules of civil procedure only allow for the imposition of sanctions "that are just." *Id. (citations omitted).* For a sanction to be just, it must be premised upon an adequate foundation. *Id.* Once an adequate foundation has been

developed to support the issuance of a sanction, the trial court must then determine what an appropriate sanction would be. *Id.* To make this determination, the trial court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout case. *Id.*

In the instant case, the trial court did not develop an adequate foundation upon which to base its sanction against TIG nor did it make any attempt to determine whether the sanction against TIG, *i.e.*, the award of attorney fees, was appropriate based upon the criteria set forth by this Court as outlined above. Instead, the trial court cited to this Court's decision in *Sanson v. Brandywine Homes, Inc.*, 215 W. Va. 307, 599 S.E.2d 730 (W. Va. 2004), for the proposition that anytime a party successfully pursues a motion to compel a settlement, the party is entitled to recover his or her attorney fees. *See Exhibit A, p. 5-6.*. However, the trial court's reliance on *Sanson* for this proposition is in error.

First, *Sanson* does not alter the long standing rule that in West Virginia litigants must bear their own attorney fees and costs.[10] It merely recognized an *exception* to the long standing rule in limited circumstances when a party to a contract has breached said contract and has acted in "bad faith, vexatiously, wantonly and for oppressive reasons."[11] *Id. at 312.* And, second,

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[10]As this Court has previously explained, "new points of law will be articulated through syllabus points as required by our State Constitution." *Walker v. Doe,* 210 W.Va. 490, 588 S.E.2d 290 (2001); *See also, State ex. rel. Medical Assurance of West Virginia v. Recht,* 213 W.Va. 457, 583 S.E.2d 80 (2003).

[11]Specifically, this Court stated as follows:

> As a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." Syllabus Point 2, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 365 S.E.2d 246 (1986). . . There are exception[s] to the American Rule and: "there is authority in equity to award to the

even if *Sanson* did alter the rule as posited by the trial court, it certainly does not do so to the extent that would support a finding that a non-party or a stranger to a contract must bear the litigation costs arising from the breach of such contract.

In *Sanson*, in response to a motion to enforce a settlement, the plaintiffs alleged that their former counsel had entered into the settlement agreement with one of the defendants, Skyline Corporation, without their consent. During a hearing on the motion, the trial court listened to arguments from counsel for Skyline as well as from plaintiffs' current counsel. Following the hearing, the trial court received and reviewed an affidavit submitted by Skyline from the plaintiffs' former counsel in which he attested that he "[had] never, and would never, in any case, accept an offer without authorization from my client." *Id. at 310.* After reviewing all of the evidence, the trial court concluded that the plaintiffs had consented to the settlement with Skyline but subsequently changed their mind. *Id. at 311-12.* Because the trial court found that the plaintiffs had agreed to the settlement, it also found that the plaintiffs should bear the financial burden caused by their actions in attempting "to rescind a valid and enforceable contract." *Id. at 312.*

Sanson is completely inapposite to the case at bar. It is uncontested that TIG was not a party to the settlement contract between plaintiffs and Mr. Galloway. A fact underscored by the trial court when it refused to allow TIG to participate in the plenary hearing. Because TIG was not a party to the contract, it can not, as a matter of law, breach that contract. However, even

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> prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, ***when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons***.

Sanson, at 312 (emphasis added).

assuming *arguendo* that TIG could have liability arising from the breach of the settlement contract, there has been no finding and no evidence that TIG acted "in bad faith, vexatiously, wantonly or for oppressive reasons" so as to justify an award of attorney fees against it.

Specifically, on May 30, 2006, after holding an evidentiary hearing involving *only the plaintiffs and Mr. Galloway*, the trial court determined that a settlement was reached between those parties by at least August 18, 2005.[12] Notwithstanding, that as late as August 30, 2005, TIG was still receiving correspondence from Mr. Galloway's personal attorney, Jason Cuomo, denying the existence of any such settlement. *See TIG's Response to Plaintiffs' Motion for Attorney Fees.*

Subsequently, on December 9, 2005, in open court, Mr. Cuomo, speaking as counsel for Mr. Galloway, again denied the existence of a settlement. *See 12/9/05 Hearing Transcript.* Papers were also submitted by Mr. Cuomo prior to the December 9, 2005 hearing which again denied the existence of a settlement. *See Galloway's Response to Plaintiffs' Motion to Compel Enforcement of Compromise Settlement Agreement.* In fact, up to and including the May 30 2006 plenary hearing, Mr. Galloway never admitted that he had agreed to the now adjudged settlement with plaintiffs.

The facts developed below also bear out that from May 17, 2005 forward, TIG actively sought confirmation from its insured regarding the existence of a settlement and offered to pay policy proceeds to plaintiffs upon such confirmation. *See Exhibits to TIG's Response to Plaintiffs' Motion and Supplement to Motion to Compel Settlement.* Thus, the existence of a settlement was disputed ***by Mr. Galloway*** and was not resolved by the trial court until May 30,

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[12] The only witness called during the plenary hearing was Mr. Wilmoth. Mr. Wilmoth was called by Mr. Fitzsimmons.

2006. Accordingly, the facts in this case do not support a finding that TIG acted in "bad faith, vexatiously, wantonly or for oppressive reasons."

Furthermore, in *Dodrill v. Egnor*, 198 W.Va. 409, 481 S.E.2d 504 (1996), a case arising from an automobile accident, this Court granted a writ of prohibition finding that the trial court's award of attorney fees was improper due to the trial court's solicitation of information from ***only one party*** and failure to give the sanctioned party's counsel an ***opportunity to make his position known.*** There, the issues of liability and damages arising from the auto accident were bifurcated for purposes of trial. Prior to the trial on liability, the defendant, James Dodrill, through his attorney, requested that the plaintiff undergo an IME which plaintiff did. The matter then proceeded to trial on the liability issue and the jury returned a verdict in favor of Mr. Dodrill. Thus, the issue of damages never went to trial and the IME report was never needed. After the trial but before the judgment order had been entered, counsel for plaintiff requested a copy of the IME report and counsel for Mr. Dodrill refused stating that it was no longer an issue. Plaintiff filed a motion to compel. The trial court thereafter entered the judgment order pursuant to the jury verdict and an order granting plaintiff's motion to compel. Mr. Dodrill ultimately filed a writ of prohibition to prevent the enforcement of the trial court's order which was denied. The IME report was then produced to plaintiff. After learning that the report had been produced, the trial court contacted plaintiff's counsel and asked how much time he had expended in defending the writ of prohibition and asked to see the IME report that had been produced. Plaintiff's counsel responded that he had spent 12.75 hours on the matter and forwarded the report to the trial court along with the cover letter Mr. Dodrill's attorney had attached to the report which was "openly hostile" and contained "disparaging remarks" about the trial court. *Id., at 508.*

Thereafter, the trial court issued an order finding that the defendant's failure to produce the report "was without reason and violative of the basic rules of etiquette, common sense and

human and civil deportment," and that he had "wrongfully and unnecessarily required plaintiff's counsel to oppose a groundless petition for a writ of prohibition." *Id.* The trial court then, on its own motion, imposed sanctions on Mr. Dodrill and ordered him to pay $1,950.00 (approximately $153.00 per hour) to the plaintiff's attorney for his work opposing the petition. *Id.*

Mr. Dodrill then filed a second writ of prohibition which this Court accepted. In finding that the trial court's award of attorney fees was "plainly in contravention of a clear statutory, constitutional, or common law mandate," this Court, citing its decision in *Bartles, supra,* held that when a trial court issues a sanction, it must be guided by "equitable principles." *Id. at 509.* Because the trial court sanctioned Mr. Dodrill without giving him an opportunity to articulate his opinion, to offer any evidence in support of his conduct, or to argue for a lesser penalty, this Court found that the trial court was not guided by "equitable principles" and, therefore, granted Mr. Dodrill's writ.

Likewise, in the instant case, the award of attorney fees against TIG was not guided by "equitable principles." By not allowing TIG to participate in the plenary hearing, the trial court deprived TIG of the opportunity to explain or to offer any evidence with regard to its actions in connection with the alleged settlement between plaintiffs and Mr. Galloway. Yet it was upon those very actions the trial court granted plaintiffs' Motion for Attorney Fees against TIG. As such, the trial court clearly acted in contravention of the procedurals standards set forth by this Court in *Bartles* and *Dodrill.*

B. EVEN IF IT IS DETERMINED THAT AN AWARD OF ATTORNEY FEES WAS APPROPRIATE, THE AMOUNT OF FEES AWARDED WAS OUTRAGEOUS AND EXCESSIVE.

Even if this Court would determine that the trial court's award of attorney fees was appropriate, an award of Five Hundred Dollars ($500) per hour is outrageous and, under the

factors set forth by this Court in *Aetna Casualty & Surety v. Petrillo*, 176 W.Va. 190, 342 S.E.2d 156 (1986), clearly excessive. In *Petrillo*, this Court held that in determining the reasonableness of an attorney fee, the following factors are to be evaluated: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship; and (12) awards in similar cases. *Id.*, *See also Brown v. Thompson*, 192 W.Va. 412, 413-14, 452 S.E.2d 728, 729-30 (1994); *Shafer v. Kings Tire Service*, 215 W.Va. 169, 177-78, 597 S.E.2d 302, 310-11 (2004). In the instant case, when applying each of the forgoing factors, it is clear that there is absolutely no basis for an attorney fee award in excess of ***Fifty Thousand Dollars***.

Pursuing the Motion to Compel Settlement did not require extensive time and labor. Mr. Fitzsimmons indicated that he "turned down work" because of the approximate seventy (70) to one hundred and one (100)[13] hours he claims he spent on the matter.[14] However, by plaintiffs'

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[13]In plaintiffs' original Motion for Attorney Fees, Mr. Fitzsimmons claimed he spent 70.5 hours on the Motion to Compel Settlement. Thereafter, in plaintiffs' Supplemental Motion for Attorney Fees, Mr. Fitzsimmons interspersed an additional 31.25 hours to his invoice. Mr. Fitzsimmons' only support for the additional hours is an affidavit from the billing attorney who summarily claims that the additional time was "reconstructed" from a review of the file. *See Plaintiffs' Supp. Motion for Attorney Fees.* However, as one court as noted, reconstructed time records are ***insufficient*** to support a motion for attorney fees. *See Suaraz v. Ward*, 1993 U.S.Dist.LEXIS 6308, 3-4 (D.N.Y. 1993)(a copy of this opinion is attached as Exhibit 1 to TIG's Response to Plaintiffs' Supp. Motion for Attorney Fees). "Contemporaneous records provide the most reliable means by which to evaluate the accuracy of counsel's account of time expended on the matter." *Id.*

[14]The trial court ultimately ordered that TIG pay attorney fees to plaintiffs for the 101.75 hours claimed by Mr. Fitzsimmons. However, those hours include time spent by Mr. Fitzsimmons

own admission, that time amounts to less than two (2) hours per week and represents ***less than 2%*** of Mr. Fitzsimmons' workload for the year. *See Plaintiffs' Motion for Attorney Fees.*

Nor did the Motion to Compel Settlement With respect to the enforcement of the settlement, it certainly did not involve any novel or difficult issues. This is evidenced by the fact that Mr. Fitzsimmons did not feel the need to cite any caselaw in support of his Motion to Compel Settlement. *See Plaintiffs' Motion to Compel Settlement* It merely required Mr. Fitzsimmons to recite his version of the events leading up to the purported settlement. *Id.*

Furthermore, no valid or credible reason was presented by Mr. Fitzsimmons or identified by the trial court for awarding Mr. Fitzsimmons fees at a rate so significantly higher than those received by equally competent and equally skilled local attorneys working in the same case. Illustratively, Mr. Selep's hourly rate was $180, Mr. Casey's hourly rate was $175 and Ms. Mushet's hourly rate was $150. *See Affidavit of Mark Rapponotti, attached to TIG's Response to Plaintiffs' Supplemental Motion for Attorney Fees.* Further, as admitted by plaintiffs, the hourly rate of Mr. Fitzsimmons' *co-counsel*, Mr. Makrocostas and Mr. Dittmar, was *$150. See Plaintiffs' Motion for Attorney Fees.*

The undersigned could find no recent decisions from this Court addressing what constitutes a reasonable hourly attorney fee rate in cases where a party prevails on a motion to compel a settlement. However, there are recent decisions addressing the reasonableness of

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prior to August 19, 2005, the date immediately subsequent to the date the trial court found that a settlement had been reached. As such, any time spent prior to August 19, 2005 was not time spent in pursuit of the motion to compel. Those hours also include the time spent finalizing the order relative to the settlement, as it is at least the same and probably less than the amount of time that Mr. Fitzsimmons would have spent preparing the settlement agreement and the contemplated consent judgment. That time, as with any other settlement, is compensated by the contingency fee arrangement between the plaintiffs and Mr. Fitzsimmons. Accordingly, it would be an unfair windfall to Mr. Fitzsimmons to be compensated twice for doing the same tasks.

attorney fee awards in similar circumstances which do provide guidance as to what a reasonable attorney fee rate would be. *See e.g., Hollen v. Hathoway Electric, Inc.*, 213 W.Va. 667, 584 S.E.2d 523 (2003)(award of fees in the amount $130 per hour in an action against a former employer to recover compensation for vacation time was reasonable even though attorney's customary rate was $200 per hour based upon type of work performed and the area in which the litigation took place); *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 217 W.Va. 102, 617 S.E.2d 143 (2003)(hourly rate of $195 was appropriate in mandamus action based upon the experience of the attorney and the difficult nature of the case challenging the constitutionality of the statutory method in selecting and approving applicants for certain grants).

Based upon this Court's decisions in *Hollen* and *West Virginia Citizens Action Group*, the attorney fee awards in the 2003 Order from the Circuit Court of Ohio County in *Latour v. United Fabricating, Inc., et al,* Civil Action No. 98-C-76, and in the 2005 Order from Circuit Court of Berkely County, *McClurken v. STG, Inc.*, Civil Action No. 03-C-727, are more illustrative of what a reasonable attorney fee would be in the instant case.[15] In *Latour*, a wrongful termination claim premised on theories of various violations of the Human Rights Act and the Workers' Compensation Act, Judge Recht awarded attorney fees in the amount of $200 per hour after the jury found that the plaintiff's unlawful termination was "malicious, oppressive, wanton, wilful or reckless." In *McClurken*, another case involving violations of the Human Rights Act, Judge Sanders awarded attorney fees in the following amounts: Jane E. Peak, Esq. - $250/hr; Harley O. Staggers, Jr., Esq. - $250/hr; Allan N. Karlin, Esq. - $200/hr; Sophie E. Zdany, Esq. - $150/hr. In so doing, Judge Sanders cited to the fact that the matter was "highly

[15]Copies of the Orders are attached to TIG's Response to Plaintiffs' Motion for Attorney Fees.

contested with a number of novel issues of law." *Id.*

However, as set forth herein, the instant case did not involve novel issues of law. It simply involved a motion to enforcement a settlement against a party that wasn't even permitted to participate in the hearing. As such, there is absolutely no justification for awarding plaintiffs' counsel attorney fees at a rate that is three times greater than he would have charged his own client.[16] Thus, by awarding plaintiffs' counsel attorney fees at a rate of $500 per hour - in addition to his one-third contingency fee, the trial court abused its power and committed clear error.

VI. CONCLUSION

The trial court abused its power, committed clear error, and exceeded its legitimate authority by: (1) ordering TIG to pay attorney fees in connection with a settlement agreement to which it was not a party; (2) ordering TIG to pay attorney fees when it was denied an opportunity to participate in the plenary hearing conducted to determine if there was, in fact, a settlement agreement, and (3) awarding attorney fees in the excessive and outrageous amount of $500 per hour. TIG has no other adequate means, such as an appeal, to prevent the enforcement of the trial court's orders awarding the attorney fees, as TIG's right to appeal this issue is not yet ripe as the matter is still pending before the trial court. Therefore, Petitioner, TIG Insurance

[16] Based upon time sheets submitted by Mr. Fitzsimmons, at the start of the underlying litigation, Mr. Fitzsimmons and the plaintiffs had agreed to a contingency fee or, in the alternative, $150 per hour.

Company, respectfully requests that a rule to show cause be issued and this Writ of Prohibition be granted.

TIG INSURANCE COMPANY,

By Counsel.

Thomas V. Flaherty (WV Bar # 1213)
Tammy R. Harvey (WV Bar #6904)
FLAHERTY, SENSABAUGH & BONASSO, PLLC
200 Capitol Street
Charleston, WV 25301
(304) 345-0200

EXHIBIT
A

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

JEFFREY A HORKULIC, REBECCA A HORKULIC, his wife, and JEFFREY HORKULIC, as natural parent and legal guardian of STEPHANIE HORKULIC and BENJAMIN HORKULIC, minors,

Plaintiffs,

v.

WILLIAM E GALLOWAY, GALLOWAY LAW OFFICES, TIG INSURANCE COMPANY, and CAMBRIDGE PROFESSIONAL LIABILITY SERVICES

Defendants.

October 4 2006
Entered In Civil Order Book
No. 72 Page 521
Brenda L. Jackson
Clerk of said Court

CIVIL ACTION NO. 02-C-244
JUDGE ARTHUR M. RECHT

ORDER

(ALLOWANCE OF ATTORNEY FEES)

On the 25th day of August, 2006, came the plaintiffs by their attorneys, Robert P. Fitzsimmons, David N. Dittmar and Dean G. Makricostas, and as well came defendants, William E. Galloway and Galloway Law Offices, by their attorney, Joseph W. Selep, and as well came defendants, TIG Insurance Company by its attorneys, Thomas V. Flaherty, Beth Ann Berger Zerman and Darla Mushet, as well as came Cambridge Professional Liability Services by its attorney, Kurt F. Fernsler, on Plaintiffs' Motion for Attorney Fees.

Thereupon, the Court entered the following findings:

1. West Virginia follows the American Rule in awarding of attorney fees, which indicates that:

"As a general rule each litigant bears his or her own attorney fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." Syl Pt. 2, Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E. 2d 246 (1986). Also see Syl Pt. 6, State ex rel. Bronson v. Wilkes, 216 W.Va. 293, 607 S.E. 2d 399 (2004).

2. There are exception to the American Rule and:

"There is authority in equity to award the prevailing litigant his or her reasonable fees as "costs", without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl Pt. 3, Sally-Mike Properties, supra.

3. In Sanson v. Brandywine Homes, Inc., 215 W.Va. 307, 599 S.E.2d 730 (2004), The West Virginia Supreme Court of Appeals cited with approval the syllabus points set forth in Sally-Mike Properties. In Sanson, the plaintiff returned a settlement check claiming that no settlement agreement had ever been reached and the defendant, Skyline, was forced to file a motion to enforce the settlement agreement. Although not included in a syllabus point, the per curiam opinion of the Court stated that "the circuit court concluded that Skyline should not have to bear the financial burden caused by the Sansons' attempt to rescind a valid and enforceable settlement agreement." Sanson, 599 S.E. 2d at 735.

4. Pursuant to Walker v. Doe, 210 W.Va. 490, 558 S.#. 2d 290 (2001), the per curiam opinion of Sanson has precedential value.

5. Under Sanson, anytime there is an action to enforce a settlement that is successful, attorney's fees are permitted to be

awarded to the prevailing party on the grounds that a party should not have to bear the financial burden caused by another party's attempt to rescind a valid and enforceable settlement agreement.

6. The actions of TIG in not consummating the settlement agreement found by this Court by a previous Order entered on August 25, 2006, fall within the exceptions for awarding attorney fees as costs and specifically constitute oppressive reasons for the awarding of such fees.

7. TIG's interests were protected *vis a vis* the settlement by Mr. Selep's representation of Galloway.

Based upon the forgoing findings it is

ORDERED that plaintiffs' Motion for Attorney fees is granted.

ORDERED that Defendants shall have twenty (20) days from August 25, 2006 to submit counter affidavits to Affidavit of Michael W. McGuane filed August 24, 2006, and Affidavit of Donlad M. Kresen filed August 25, 2006, and respond to Plaintiffs' Supplemental Motion for Fees filed on August 22, 2006, and Plaintiffs' Supplemental Exhibit 1 to Motion for Attorney Fees filed on August 24, 2006.

ORDERED that this Court shall issue a further Order regarding the amount of attorneys fees to be awarded to Plaintiffs and against TIG.

ORDERED that the Clerk of this Court shall provide an at tested copy of this Order to all counsel of record.

ORDERED objections of all defendants are preserved to this Order.

It is so **ORDERED.**

Entered this 4th day of October, 2006.

ARTHUR M. RECHT, JUDGE

A TRUE COPY
Attests
Brenda L. Jackson
Clerk, Circuit Court, Hancock County

Deputy

EXHIBIT
B

IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

JEFFREY A HORKULIC, REBECCA A HORKULIC, his wife, and JEFFREY HORKULIC, as natural parent and legal guardian of STEPHANIE HORKULIC and BENJAMIN HORKULIC, minors,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 02-C-244
		JUDGE ARTHUR M. RECHT
WILLIAM E GALLOWAY, GALLOWAY LAW OFFICES, TIG INSURANCE COMPANY, and CAMBRIDGE PROFESSIONAL LIABILITY SERVICES	:	
Defendants.	:	

MEMORANDUM OF OPINION AND ORDER

(ATTORNEY FEES/ENFORCEMENT OF SETTLEMENT AGREEMENT)

The matter is before the Court upon the Motion of the Plaintiffs for an order compelling the defendant, TIG Insurance Company to pay the fees of their lawyers relating to the enforcement of a settlement resolving an underlying professional liability claim of the plaintiffs against William Galloway.

By Order entered August 25, 2006, the plaintiffs' motion to compel enforcement of a compromised settlement agreement was granted. Thereafter the plaintiffs' moved for an award of attorney fees and expenses associated with the enforcement of the settlement agreement which this Court found had been formulated and agreed upon as early as August 18, 2005, and punctuated with a letter from

the lawyer chosen by TIG Insurance Company to represent William Galloway in the underlying action dated December 20, 2005 confirming it was that lawyer's belief that "we had a settlement".

This Court, by Order entered the 4th day of October 2006, found that the plaintiffs were entitled to an award of legal fees and expenses for relying upon an analysis of Sanson v. Brandywine Homes, Inc., 215 W.Va. 307, 599 S.E. 2d 730 (2004) which is more completely set forth in that Memorandum of Opinion and Order entered on October 4, 2006.[1]

The only remaining issue is the amount of the award of legal fees and expenses which requires an analysis of the template formulated in Syllabus 4, Aetna Casualty and Surety Co. v.Petrillo, 176 W.Va. 190, 342 S.E. 2d 156 (1986). When all of the Petrillo factors are considered and weighed, this Court has no difficulty in awarding the plaintiffs' fees based upon submission of Robert P. Fitzsimmons, Esquire, reflecting a total of One Hundred One and one half (101.5) hours expended in the effort to enforce the settlement agreement. Further, this Court finds that a usual customary fee of

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[1]There was some suggestion by TIG Insurance Company that the Order of October 4, 2006 should not contain a finding that its conduct should be considered oppressive which is one of the findings required in Sally-Mike Properties v. Yokum, 179 W.Va. 48, 365 S.E. 2d 246 (1986), as a platform for an award of attorneys fees. While there may not have been a specific reference to TIG's oppressive conduct, this Court has no hesitancy in finding that the conduct of TIG in delying the implementation of an agreed settlement for nearly one year is nothing other than oppressive.

Five Hundred Dollars ($500) per hour for a person of Mr. Fitzsimmons' legal stature in this community is appropriate[2].

Accordingly, judgement is hereby awarded on behalf of the plaintiffs in the amount of Fifty Thousand Seven Hundred Fifty Dollars ($50,750) plus expenses in the amount of Fifty-four Dollars ($54.00). To all of which the objection of TIG Insurance Company is hereby preserved.

It is so **ORDERED.**

Entered this 4th day of October, 2006.

ARTHUR M. RECHT, JUDGE

A copy of this Memorandum of Opinion and Order has been sent this date to all counsel of record as follows:

Robert P. Fitzsimmons, Esquire
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Wheeling WV 26003

David N Dittmar Esquire
Dean G. Makricostas, Esquire
Dittmar Taylor & Makricostas
P O Box 2827
Weirton WV 26062

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[2]The plaintiffs also submitted the time sheets of Mr. Fitzsimmons' co-counsel. However, this Court believes that any additional award for the efforts of co-counsel would be duplicative and therefore unfair. This is not to deprecate the talent and energies of co-counsel, it is only an attempt to achieve a fair resolution of this issue.

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500 West Madison Street
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Joseph Selep, Esquire
Zimmer Kunz
600 Grant Street Suite 3300
Pittsburgh PA 15219

CERTIFICATE OF SERVICE

I, Tammy R. Harvey, counsel for TIG Insurance Company, do hereby certify that I have served the foregoing ***Petition for Writ of Prohibition and Memorandum in Support of Petition for Writ of Prohibition*** upon counsel of record this 6th day of February, 2007, by depositing true copies in the United States mail, postage prepaid, addressed as follows:

Robert P. Fitzsimmons, Esq.
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and

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